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Supreme Court, U.S.
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JUN 8 1992
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No. 91-1996

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANESTHESIA ASSOCIATES OF MT. KISCO,

Respondent.

vs.

ANTONIO MARENO and KATHLENE MARENO,

Petitioners.

On Petition for a Writ of Certiorari
to the New York Supreme Court,
Appellate Term, Ninth Judicial District

PETITION FOR WRIT OF CERTIORARI

ANTONIO MARENO
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QUESTION PRESENTED

Whether the denial of petitioners' motion for leave to appeal to an intermediate state appellate court from an order of affirmance of a lower state appellate court deprived petitioners of due process as guaranteed under the 14th amendment to the federal constitution in the circumstances of the case where the rulings sought to be appealed were made in derogation of controlling statutory law and case law precedents of the intermediate and highest appellate courts in the state system, and the right of appeal is by permission only?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Jurisdiction 3

Constitutional Provision and Statutes Involved 4

Statement of the Case 5

Reason for Granting the Writ

Denial of leave to appeal in this case holds the doctrine of stare decisis hostage to a whimsical judicial discretion that deprives petitioners of the equal protection of the law unless this court reverses the "Cardinal Sin" committed by the Appellate Term in conformity to controlling Court of Appeals rulings still in place in New York and which the Appellate Division seems unwilling to address 12

Conclusion 16

TABLE OF CITATIONS

Page

Cases Cited:

Daven-White Realty Corp. v. Del Amed, 10 A.D.2 973(2d Dept. 1960) 12

Dobbins v. Erie County, 58 A.D.2d 733(4th Dept.1977) 9

Golia v. Health Ins. Plan of Greater New York, 6 A.D.2d 884(2d Dept.1958) 9

Hawkins v. Lenox Hill Hospital, 138 A.D.2d 572(2d Dept.1988) 9

Lichtman v. Grossbard, 73 N.Y.2d 792(1988) 13

Martin v. Herzog, 228 N.Y. 164(1920) 13

Robinson v. Rogers, 237 N.Y. 467(1924) 13

United Calendar Mfg. Corp. v. Huang, 94 A.D.2d 176(2d Dept. 1983) 9

U. S. Constitution Cited:

14th Amendment 4

Statutes Cited:

CPLR§5703(a)[McKinney's] 4

TABLE OF CITATIONS
(continued)

Page

Statutes Cited:

CPLR§5501(a)3.[McKinney's] 5

Miscellaneous Citation:

Carmody-Wait 2d Ed.(1990),§70:323,
pp.340-341, footnotes 86-89 14

A P P E N D I X

Appendix A - Decision Dismissing
Appeal and Affirming Order 1a

Appendix B - Resettled Order
of the Justice Court 3a

Appendix C - Appellate Term Order
Denying Leave to Appeal 6a

Appendix D - Appellate Division
Order Denying Leave to Appeal 8a

Appendix E - Petitioners' Notice
of Appeal 10a

No.

IN THE
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October Term, 1991

ANESTHESIA ASSOCIATES OF MT. KISCO,

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ANTONIO MARENO and KATHLENE MARENO,

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PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK SUPREME COURT,
APPELLATE TERM, NINTH JUDICIAL DISTRICT

The petitioners, Antonio Mareno and Kathlene Mareno, respectfully pray that a writ of certiorari issue to review the order of affirmance of the Appellate Term of the Supreme Court of the State of New York, Ninth Judicial District, entered in this proceeding on September 19, 1991.

OPINIONS BELOW

The order of the Appellate Term affirmed upon a brief decision the resettled order of the Justice Court of the Village of Mt. Kisco, New York(Cerbone, J.) entered August 29, 1990, granting summary judgment in favor of the plaintiff and against the defendants on the eve of trial by jury of all issues in the complaint and counterclaim, denied the defendants' cross-motion to dismiss the complaint and sever the counterclaim for trial by jury, and dismissed the defendants' counterclaim. The decision of the Justice Court was rendered orally and in camera in chambers.

Leave to appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, was timely applied for and denied, first, by order of the Appellate Term, entered December 9, 1991, and then, by order of the Appellate Division, entered March 12, 1992.

To petitioners' knowledge none of the proceedings herein have been reported. The decision of the Appellate Term is reproduced in Appendix A to this petition. And the resettled order of the Justice Court is reproduced in Appendix B to this petition.

Additionally, the order of the Appellate Term denying leave to appeal is reproduced in Appendix C to this petition. And the order of the Appellate Division denying leave to appeal is reproduced in Appendix D to this petition. And finally, petitioners' Notice of Appeal, bringing up for review the interlocutory preclusion status of the plaintiff, is reproduced in Appendix E to this petition.

JURISDICTION

The order of the Appellate Division denying leave to appeal from the Appellate Term's order of affirmance was entered March 12, 1992, although the time of

entry is not noted, and its effect constitutes the Appellate Term the highest court in the state's judicial system in which a determination of the issues raised in this case could be had. And this petition is served and filed within ninety(90) days of the date of entry of said Appellate Division order. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads in relevant part:

> . . . nor shall any State deprive any person of . . . property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5703 of the Civil Practice Law and Rules(McKinney's Consolidated Laws of New York, Book 7B) reads in relevant

part:

> Appeals to appellate division from appellate courts.
>
> (a) From appellate terms. An appeal may be taken to the appellate division, from an order of the appellate term which determines an appeal from a judgment or order of a lower court, by permission of the appellate term or, in the case of refusal, of the appellate division.. . .

Section 5501 of the Civil Practice Law and Rules(McKinney's Consolidated Laws of New York, Book 7B) reads in relevant part:

> Scope of review.
>
> (a) Generally, from final judgment. An appeal from a final judgment brings up for review:
>
> * * *
>
> 3. any ruling . . . which was a refusal or failure to act as requested by the appellant . . ..

STATEMENT OF THE CASE

In 1989 petitioners, who are husband and wife, were sued in the Justice Court in Mt. Kisco, New York, by Anesthesia Associates of Mt. Kisco, a co-partnership

of anesthesiologists with whose constituent partners petitioners had absolutely no privity of contract[and whose claims had previously been rejected by one of petitioner-husband's medical insurers], to recover the sum of $1,670 claimed to be due for the administration of anesthesia to the petitioner-wife in 1985 on three separate occasions when she was operated upon for the removal of cancerous tissue at the Northern Westchester Hospital Center in Mt. Kisco. The petitioner-wife had been led to believe that the alleged services had been performed by hospital staff physicians, and paid for through petitioner-husband's medical insurance.

Petitioners interposed an answer to the Justice Court complaint, generally denying its material allegations and setting up an affirmative defense that the plaintiff entity was not the real party in interest to the medical claims asserted. Petitioners

also interposed a counterclaim to recover damages in the amount of $5,010 for abuse of legal process, and also demanded a trial by jury.

While rejecting an overture by the village justice to waive trial by jury, petitioners managed to procure additional leverage in the case by successfully obtaining a de facto preclusion status against the plaintiff by reason of its failure to serve a verified bill of particulars as to its claims in response to petitioners' demand, lacking only the formal entry of a default order that had been handed up to the court on petitioners' uncontested motion to preclude. The case was in this posture when, on the eve of trial by jury scheduled for March 20, 1990, an attorney associated in the case with the plaintiff's attorney of record made a belated motion for summary judgment in his own name after feigning an illness in order to maneuver for ample mo-

tion lead time.

Petitioner-husband immediately requested the court in writing to ignore the motion for summary judgment since it had not been made by the plaintiff's attorney of record, and, also cross-moved for the dismissal of the complaint and severance of the counterclaim for trial by jury, based upon the statement of one of plaintiff's constituent partners that the skills-driven claims for compensation for medical services were owned by the partnership. The Justice Court, ignoring the admonition to disregard the motion for summary judgment, granted the motion, denied the cross-motion, and dismissed the counterclaim. An appeal to the Appellate Term by petitioners ensued.

In their appeal brief petitioners raised two arguments, namely, "POINT I THE TOWN JUSTICE WAS REQUIRED TO DISREGARD PLAINTIFF'S DISPOSITIVE MOTION SINCE IT WAS NOT MADE BY ITS ATTORNEY OF RECORD."[Dob-

bins v. Erie County, 58 A.D.2d 733(4th Dept.1977). Accord: Hawkins v. Lenox Hill Hospital, 138 A.D.2d 572(2d Dept.1988)] and "POINT II THE PLAINTIFF WAS NOT AND COULD NOT BE THE REAL PARTY IN INTEREST WITH RESPECT TO THE MEDICAL CLAIMS IN SUIT."[Golia v. Health Ins. Plan of Greater New York, 6 A.D.2d 884(2d Dept.1958), affirmed, 7 N.Y. 2d 931. See and compare, United Calendar Mfg. Corp. v. Huang, 94 A.D.2d 176(2d Dept. 1983)]. And the constitutional issue was initially broached under Point II subheading "(c) Estoppel" in the following language:

> "If nothing else, that the plaintiff should have been capable of launching a motion for dispositive relief in this case in the aftermath of its double default practicewise, is something of a mystery, given the fact that the leverage in the case at this point was with the defendants. Trial judges routinely sign off on tendered preclusion orders with such regularity that the practice of abstention here strongly implicates the denial of due process. There can be no doubt but that in the posture of this case the

> plaintiff was estopped from going forward with its case, in consequence of which, all that remained for the Town Justice to do in this case on the cross-motion record before him was to enter an order of preclusion, sever the counterclaim, and schedule or reschedule the issues raised under the counterclaim for trial by jury.. . ."

In affirming the Justice Court the Appellate Term addressed neither of petitioners' main arguments, opting instead to dismiss that branch of the appeal addressing the de-facto preclusion status of the plaintiff entity in the Justice Court, and then, making the quantum leap around the gut legal issues, affirmed on the facts after muting petitioner-husband's voice in the Justice Court[Appendix B, p.3a].

And in their two-stage motion for leave to appeal to the Appellate Division petitioners continued their assault on the constitutional implications of the Appellate Term's disposition of the appeal. Addressing CPLR§5501 petitioners argued:

> ". . . the Appellate Term's failure to recognize the efficacy of this statute in relation to the uncontroverted facts at bar supportive of the de-facto estoppel imposed on the plaintiff deprives the defendants of the leverage in the case they enjoyed on the eve of trial by jury of all issues as well as of the equal protection of the law to which they were justly entitled in that posture. Given the statutory mandate, it does not matter that "There is no order from which an appeal may be taken." It is the negative conduct of the trial court which is the subject of appellate review in this context, in plain recognition of the statutory embrace of errors of omission as well as of errors of commission by the trial court."

And, addressing their affirmative defense, petitioners argued:

> "Since the defendant's position is that Golia is controlling, it is appropriate that the case at bar be reviewed by this court which decided Golia. The Justice Court never said what it thought the case held; and the Appellate Term has avoided coming to grips with that case. Due process dictates that meaningful appellate review of the record facts in the case should be had."

REASON FOR GRANTING THE WRIT

DENIAL OF LEAVE TO APPEAL IN THIS CASE HOLDS THE DOCTRINE OF STARE DECISIS HOSTAGE TO A WHIMSICAL JUDICIAL DISCRETION THAT DEPRIVES PETITIONERS OF THE EQUAL PROTECTION OF THE LAW UNLESS THIS COURT REVERSES THE "CARDINAL SIN" COMMITTED BY THE APPELLATE TERM IN CONFORMITY TO CONTROLLING COURT OF APPEALS RULINGS STILL IN PLACE IN NEW YORK AND WHICH THE APPELLATE DIVISION SEEMS UNWILLING TO ADDRESS.

Time was in New York within the litigation experience of the petitioner-husband that even an unheralded perception of the law on the part of the Appellate Division, Second Department, which differed from the view of the law held by the then Appellate Term, Second Department, was enough to galvanize that intermediate appellate tribunal into countermanding the Appellate Term's refusal of leave to appeal, and to eventually reverse the errant Appellate Term ruling. See Daven-White Realty Corp. v. Del Amed, 10 A.D.2d 973(2d Dept.1960). Now, however, not even long standing precedent of the New York Court of Appeals, to say noth-

ing about its own precedent on the instant appeal's gut issues, is enough to move the Appellate Division, Second Department, to release the brakes on meaningful appellate review that has been so injudiciously applied in this case by the Appellate Term, Ninth Judicial District, in its activist posture.

On the record in this case there can be no doubt but that the Appellate Term's deviation from the issues fully briefed by the parties runs squarely up against the proscription enunciated by the New York Court of Appeals. See Lichtman v. Grossbard, 73 N.Y.2d 792(1988), rehearing denied, 73 N.Y.2d 912(1988); Robinson v. Rogers, 237 N.Y. 467(1924); Martin v. Herzog, 228 N.Y. 164(1920). As Mr. Justice Cardozo long ago succintly put it in Martin which also arose in the Second Judicial Department(p.167): "A controversy . . . put out of the case by the parties

will not be put into it by the appellate court." Particularly should this be the case, petitioners would hasten to add, where, as in this case, the so-called offending affirmation defect in practice, if it be such, could readily have been converted into "affidavits" had the Justice Court so desired. See Carmody-Wait 2d Ed.(1990), §70:323, pages 340-341, and cases cited in footnotes 86 through 89. In short, there is no justification for the Draconian results reached in the Appellate Term which only compounds the errors committed in the Justice Court.

But in the final analysis it is disquieting to be cognizant of the Court of Appeals' disapproval of the "loose cannon" type behavior of inferior appellate tribunals such as petitioners have experienced in this case, and be unable to advance a meritorious cause to a higher level of appellate consideration because

the end of the line comes too quickly under §5703(a). The scenario should not happen in this case. And, hopefully, it will not. What should make a difference is the constitutional implications of the awesome potential a §5703(a) has for putting an appellate tribunal on the cutting edge of spawning a double standard destined to throw the law into disarray[depending on where one enters the system], and with little or no accountability for the pursuit of an agenda other than that dictated by the demands of stare decisis.

On the record in this case petitioners are entitled to go to the jury on the issues raised in their counterclaim. This court is urged to protect that right against the exercise of a judicial discretion under §5703(a) which cannot pass constitutional muster in this case.

CONCLUSION

For the reason stated, and to prevent a miscarriage of justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____
ANTONIO MARENO
Attorney for Petitioners

June 4, 1992

APPENDIX A -- DECISION DISMISSING APPEAL AND AFFIRMING ORDER

0056G/jia (2375T)
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 9th and 10th JUDICIAL DISTRICTS

PRESENT: DiPAOLA, P.J., GEILER and COLLINS, JJ.

NO. 90-627W

ANESTHESIA ASSOCIATES OF MT. KISCO,

Plaintiff-Respondent,

-against-

DECIDED SEP 19 1991

ANTONIO MARENO and KATHLENE MARENO,

Defendants-Appellants.

Appeal from an order of the Justice Court of the Village of Mt. Kisco, Westchester County(Cerbone, J.) entered August 29, 1990 granting plaintiff's motion for summary judgment and denying defendants' motion to dismiss the complaint, and from a "refusal to enter an order of preclusion" dismissed.

There is no order from which an appeal may be taken.

Order granting plaintiff's motion

for summary judgment and denying defendants' cross motion to dismiss the complaint affirmed with $10 costs.

In our opinion, summary judgment was properly granted to plaintiff in this action to recover for medical services rendered as we find no triable issues. We note that in opposition to plaintiff's motion and in support of defendants' motion defendant Antonio Moreno submitted an affirmed statement rather than an affidavit. Although affirmant is an attorney, the statement has no probative value since an affirmed statement may only be submitted by an attorney who is not a party to the action (CPLR 2106).

All concur.

APPENDIX B -- RESETTLED ORDER OF THE JUSTICE COURT

JUSTICE COURT : VILLAGE OF MT. KISCO
COUNTY OF WESTCHESTER

- -x

Index No.
C89-42

ANESTHESIA ASSOCIATES OF MT. KISCO,

Plaintiff,

-against- Resettled Order

ANTONIO MARENO and
KATHLEEN MARENO,

Defendants.

- -x

Upon the Notice of Motion dated March 7, 1990, the Affidavit of TAE C. CHUNG, M.D., sworn to on March 6, 1990, the Notice of Cross-Motion dated March 23, 1990 and the Affirmation of ANTONIO MARENO dated March 23, 1990, the Affirmation of JEROME T. DORFMAN in opposition to defendants' Cross-Motion and in Reply dated April 4, 1990, the Affirmation of ANTONIO MARENO dated April 7, 1990, the letter of CHARLES JACOBSON dated April 18, 1990 and the letter of ANTONIO MARENO dated April 24,

1990 and upon hearing CHARLES JACOBSON of counsel to DORFMAN & JACOBSON in support of the plaintiff's Motion and in opposition to the defendants' Cross-Motion and upon hearing ANTONIO MARENO, Esq., in opposition to plaintiff's Motion and in support of defendants' Cross-Motion and after due deliberation having been held thereon, it is

ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Summary Judgment is, in all respects, granted and that defendants' Cross-Motion to dismiss the Complaint is, in all respects, denied and that the Clerk of this Court is directed to enter a judgment in favor of the plaintiff, ANESTHESIA ASSOCIATES OF MT. KISCO and against ANTONIO MARENO and KATHLEEN MARENO in the sum of $1,670.00 together with interest from November 11, 1985 together with costs and disbursements of this action, and it is further

ORDERED, ADJUDGED AND DECREED that the counterclaim of the defendants is hereby,

in all respects, dismissed.

DATED: August 29, 1990

E N T E R

s/Joseph J. Cerbone
Justice Joseph J. Cerbone

APPENDIX C -- APPELLATE TERM ORDER DENYING LEAVE TO APPEAL

Cal. No. 90-672W
SEPTEMBER 1991 TERM

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County on DEC 09 1991

Present--Hon. ANDREW J. DiPAOLA Presiding Justice
" " WILLIAM R. GEILER
" " PATRICIA D. COLLINS Justices

----------x

ANESTHESIA ASSOCIATES OF MT. KISCO,

Plaintiff-Respondent,

-against-

ANTONIO MARENO and KATHLENE MARENO,

Defendants-Appellants.

----------x

The above named appellants having moved this court by notice of motion returnable November 1, 1991, for leave to appeal to the Appellate Division, and said motion having duly come on to be heard;

Now, on reading and filing the papers in support of said motion and the papers filed in opposition thereto, and due

deliberation having been had thereon, it is

ORDERED that the motion for leave to appeal to the Appellate Division is denied.

ANDREW J. DiPAOLA
PRESIDING JUSTICE
APPELLATE TERM
SUPREME COURT, STATE OF NEW YORK
Justice, Appellate Term

APPENDIX D -- APPELLATE DIVISION ORDER DENYING LEAVE TO APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

5513N
C/kr

STANLEY HARWOOD, J.P.
GERALDINE T. EIBER
DAVID S. RITTER
JOHN COPERTINO, JJ.

92-00433

Anesthesia Associates of Mt. Kisco, respondent, v Antonio Mareno, et al., appellant.

DECISION & ORDER ON MOTION
Motion for Leave to Appeal to the Appellate Division

Motion by the defendants for leave to appeal to this court from an order of the Appellate Term of the Supreme Court, 9th and 10th Judicial Districts, dated September 19, 1991, which affirmed an order of the Justice Court, of the Village of Mount Kisco, entered August 29, 1990.

Upon the papers filed in support of the motion and papers filed in opposition or relation thereto; it is

ORDERED that the motion is denied.

HARWOOD,J.P.,EIBER,RITTER and COPERTINO,JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 12, 1992

ANESTHESIA ASSOCIATES OF MT. KISCO
v MARENO

APPENDIX E -- PETITIONERS' NOTICE OF APPEAL

JUSTICE COURT : VILLAGE OF MT. KISCO
COUNTY OF WESTCHESTER

- -x

Index No.

ANESTHESIA ASSOCIATES OF MT. KISCO, C89-42

Plaintiff,

-against- Notice of Appeal

ANTONIO MARENO and
KATHLEEN MARENO,

Defendants.

- -x

S I R :

PLEASE TAKE NOTICE that the above named defendants hereby appeal to the Appellate Term of the Supreme Court of the State of New York, Ninth Judicial District, from the resettled order(Cerbone, J.) entered in the above entitled action on the 29th day of August, 1990, at the instance of Dorfman & Jacobson, Esqs., purporting to appear in the action as attorneys for plaintiff, and which granted summary judgment in favor of plaintiff and against defendants, denied defendants' cross-motion to dismiss the complaint,

and dismissed defendants' counterclaim, and this appeal is taken from each and every part of said resettled order as well as from the whole thereof, and from the court's(Cerbone, J.) refusal to enter an order of preclusion against plaintiff upon its default in serving a verified bill of particulars as demanded by defendants, and upon defendants' prior motion therefor, returnable in this court on October 19, 1989.

Dated: Yorktown Heights, N.Y.

October 1, 1990

Yours, etc.

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